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IN THE SUPREME COURT OF CALIFORNIA

JOHNNY BLAINE KESNER,
Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA,
Respondent,

SUPREME COURT
FILED
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Deputy

PNEUMO ABEX, LLC,
Real Party in Interest.

AFTER A DECISION BY THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION THREE
CASE NO. A136378 (CONSOLIDATED W/ A136416)

OPENING BRIEF ON THE MERITS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
ISSUES PRESENTED	1
INTRODUCTION	2
STATEMENT OF FACTS	4
PROCEDURAL HISTORY	6
A. The pleadings	6
B. The court proceedings	7
LEGAL DISCUSSION	9
I. THIS COURT SHOULD NOT IMPOSE ON EMPLOYERS A DUTY TO PROTECT AGAINST TAKE-HOME EXPOSURES EXPERIENCED BY PEOPLE WHO ARE NEITHER EMPLOYEES NOR VISITORS TO THE EMPLOYER'S PREMISES	9
A. Whether to impose a duty is a question of public policy that requires analysis of multiple factors	9
B. Nationwide, a growing majority of courts have concluded that imposing a duty to protect against take-home exposures is bad public policy	12
C. Prior to this case, California Court of Appeal decisions followed the majority rule and declined to impose a duty in take-home cases	20
D. In other contexts, this Court has embraced the same public policy concerns that other courts have relied on in rejecting a duty in take-home cases	23
E. The Court of Appeal's discussion of countervailing public policies was flawed	28

F. The proximate cause doctrine also weighs against liability for take-home exposures 33

II. IF THIS COURT HOLDS THAT EMPLOYERS OWE A DUTY TO PROTECT NON-EMPLOYEES FROM TAKE-HOME EXPOSURES, THAT DUTY SHOULD NOT BE EXTENDED BEYOND IMMEDIATE FAMILY MEMBERS 36

CONCLUSION 40

CERTIFICATE OF WORD COUNT 41

TABLE OF AUTHORITIES

Page(s)

Cases

Alcoa, Inc. v. Behringer
(Tex.App. 2007) 235 S.W.3d 456 .... 14, 17

Baxter v. Superior Court
(1977) 19 Cal.3d 461 .... 11, 12

Beacon Residential Community Assn. v. Skidmore, Owings & Merrill LLP
(2014) 59 Cal.4th 568 .... 25, 26

Becker v. Baron Bros., Coliseum Auto Parts, Inc.
(1994) 138 N.J. 145 [649 A.2d 613] 30

Bigbee v. Pacific Tel. & Tel. Co.
(1983) 34 Cal.3d 49 33

Bily v. Arthur Young & Co.
(1992) 3 Cal.4th 370 .... 10, 24, 25, 29

Bootenhoff v. Hormel Foods Corp.
(W.D.Okla., July 30, 2014, No. CIV-11-1368-D)
2014 WL 3744011 .... 14, 17

Borer v. American Airlines, Inc.
(1977) 19 Cal.3d 441 11

Cabral v. Ralphs Grocery Co.
(2011) 51 Cal.4th 764 .... 10, 28, 29

Campbell v. Ford Motor Co.
(2012) 206 Cal.App.4th 15 .... *passim*

Castellon v. U.S. Bancorp
(2013) 220 Cal.App.4th 994 32

Chaisson v. Avondale Industries, Inc.
(La.Ct.App. 2006) 947 So.2d 171 .... 19, 38

CSX Transp. Inc. v. Williams
(2005) 278 Ga. 888 [608 S.E.2d 208] 13

Doe v. Pharmacia & Upjohn Co., Inc.
(2005) 388 Md. 407 [879 A.2d 1088] 13, 15, 16

Elden v. Sheldon
(1988) 46 Cal.3d 267 .... 11, 25

Elsheref v. Applied Materials, Inc.
(2014) 223 Cal.App.4th 451 .... 22, 23, 27

Ferguson v. Lieff, Cabraser, Heimann & Bernstein
(2003) 30 Cal.4th 1037 .... 34, 35

Georgia Pacific, LLC v. Farrar
(2013) 432 Md. 523 [69 A.3d 1028] 13, 15

Gillen v. Boeing Co.
(E.D.Pa., Aug. 26, 2014, No. 13-cv-03118-ER) ___
F.Supp.2d ___ [2014 WL 4211354] 14

Hoff v. Vacaville Unified School Dist.
(1998) 19 Cal.4th 925 .... 9, 11, 24, 29

Hoyt v. Lockheed Martin Corp.
(9th Cir. 2013) 540 F. App. 590 17

In re Certified Question from the Fourteenth Dist. Court of Appeals of Texas
(2007) 479 Mich. 498 [740 N.W.2d 206] 13, 15, 16, 17

In re Combustion Engineering, Inc.
(3d Cir. 2005) 391 F.3d 190 16

Johnson v. American Standard, Inc.
(2008) 43 Cal.4th 56 35

Martin v. Cincinnati Gas and Elec. Co.
(6th Cir. 2009) 561 F.3d 439 .... 14, 17

Matter of New York City Asbestos Litig.
(2005) 5 N.Y.3d 486 [840 N.E.2d 115] 13, 15, 19, 28, 36

Maupin v. Widling
(1987) 192 Cal.App.3d 568 34

Mosley v. Arden Farms Co.
(1945) 26 Cal.2d 213 34

Oddone v. Superior Court
(2009) 179 Cal.App.4th 813.................................20, 21, 22, 23, 27

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(2006) 186 N.J. 394 [895 A.2d 1143]...............................18, 37, 38

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(2012) 53 Cal.4th 335 ....9, 11, 23

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99] 34

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(2001) 26 Cal.4th 860 35

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(1999) 20 Cal.4th 310 ....34, 35

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(Del. 2011) 26 A.3d 162 ....12, 15

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(2007) 140 Wash.App. 1008 [2007 WL 2325214] 19

Rohrbaugh v. Owens-Corning Fiberglas Corp.
(10th Cir. 1992) 965 F.2d 844 ....14, 17

Rowland v. Christian
(1968) 69 Cal.2d 108 ....*passim*

Satterfield v. Breeding Insulation Co.
(Tenn. 2008) 266 S.W.3d 347 18

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(E.D.Pa., Mar. 25, 2014, No. 12-6189) ___ F.Supp.2d ___
[2014 WL 1225896]...38

Simpkins v. CSX Transp., Inc.
(2012) 358 Ill.Dec. 613 [965 N.E.2d 1092] 14

Taylor v. Elliott Turbomachinery Co. Inc.
(2009) 171 Cal.App.4th 564 32

Thing v. La Chusa
(1989) 48 Cal.3d 644 .... 11, 12

Van Fossen v. MidAmerican Energy Co.
(Iowa 2009) 777 N.W.2d 689 .... 13, 15, 16

Verdugo v. Target Corp.
(2014) 59 Cal.4th 312 .... 11, 24, 29

Zimko v. American Cyanamid
(La.Ct.App. 2005) 905 So.2d 465 .... 19, 37

Statutes

Code of Federal Regulations, title 29, § 1910.1200 (2013) 33

Civil Code, § 1714, subd. (a) 10

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Real Party in Interest.

OPENING BRIEF ON THE MERITS

ISSUES PRESENTED

1. Does an employer owe a duty of care to persons claiming injury from exposure to asbestos solely through off-site contact with employees who carry asbestos fibers on their work clothing, tools, vehicles or persons?

2. If an employer owes such a duty, is it limited to immediate family members living full-time in the home, or does a duty extend to visitors, guests, or others the employee may come into contact with?

INTRODUCTION

Mesothelioma is a cancer that is often—but not always—caused by inhaling various rock fibers known collectively as asbestos. The latent disease appears decades after the fibers are inhaled. Now, long after the end of the era when asbestos was used as a component in consumer products, plaintiffs who develop mesothelioma understandably look for creative ways to link their disease to some incidence of asbestos exposure in years past, and then to impose liability based on that exposure. Here they are pushing for a rule that would hold employers liable for so-called "take-home" exposures, arguing that companies that used asbestos in the workplace owe a duty not only to protect their own employees from direct exposures, but also owe a duty to protect anyone who later comes into contact with those employees. This Court should hold that, especially in the context of latent diseases with highly disputed medical origins, no such duty exists.

Plaintiff Johnny Blaine Kesner sued 19 defendants after he was diagnosed with mesothelioma. He alleged that he personally used or handled various asbestos products made by entities who are not parties to this action, and that those products contributed to his disease. But as to defendant Pneumo Abex, Kesner did not use any Abex product, nor was he present when an Abex product was used. Instead, Kesner asserted that Abex is responsible for his disease because, as a child, he was allegedly exposed to asbestos fibers on the clothing of his uncle, an Abex employee. Kesner never lived

with his uncle, but he claimed he was a regular visitor to his uncle's home in West Virginia for several years.

The trial court granted nonsuit on Kesner's negligence claim against Abex, concluding that Abex owed no duty to protect Kesner against exposure to asbestos fibers in his uncle's home. The Court of Appeal, however, disagreed with the trial court and determined that Abex owed a duty to Kesner.

This Court, in deciding whether a duty was owed, is not writing on a blank slate. Eight other state Supreme Courts have already considered the question of liability for take-home exposures to asbestos. Six out of eight have reached the same conclusion as the trial court here—that the law does not impose a duty to protect against take-home exposures. Several federal courts have agreed, as have state intermediate appellate courts, including the California Court of Appeal in three published opinions.

The collective wisdom of those decisions is that fundamental principles of public policy weigh against imposing a duty to protect against take-home exposures. Courts have emphasized the remoteness of any connection between the defendant's conduct and the plaintiff's claimed injury. And courts have cited the intolerable burden that would be placed on employers (and society) if courts were to expose employers to lawsuits from the potentially limitless pool of plaintiffs who could claim take-home exposures. Claimants could seek redress from the employer of any friend or relative that the person regularly visited decades earlier. Claimants could include waiters or bus drivers whose regular customers and passengers once worked at locations where asbestos was used. They

could also include anyone who had their own direct exposures to asbestos from sources unrelated to the employer defendant (as is true of Kesner here).

A decision permitting liability for take-home exposures would not only multiply the number of defendants in every mesothelioma case in California, but it would have a dramatic impact on cases involving lung cancer and other latent diseases. The Court of Appeal acknowledged that chemicals, fumes, and toxins other than asbestos will be implicated by the ruling. And not just California employers could be subject to the duty. Any employer anywhere could be hailed into a California court, as Abex was here in connection with its West Virginia plant, even if their plant or worksite sits in a jurisdiction where that employer legally has no duty for take-home exposures.

This Court should follow the majority rule and hold that Abex cannot be liable to Kesner. Whether the issue is viewed as a question of duty or as a question of proximate cause, established principles of public policy weigh strongly in favor of rejecting liability for take-home exposures.

STATEMENT OF FACTS

In 1972, 10-year-old Kesner and his mother moved to Romney, West Virginia, where Kesner's aunt and uncle, Francis and George, lived. (4 AA 911-912.) During the mid-1970s, Kesner regularly visited his uncle George's home. (Typed opn. 3.) Kesner visited a few times a week as a teenager, and after he joined the

Navy in 1979, he would visit on furloughs. (4 AA 1066, 1070-1071.) "[E]very once in a while" Kesner would sleep over. (Typed opn. 3, fn. 2; 4 AA 915.) He would typically see his uncle in the mornings before heading out to school, as his uncle was arriving home after working the night shift. (4 AA 913.) They would occasionally hunt, ride motorcycles, play football and softball, roughhouse, take rides in George's car, and have breakfast. (4 AA 914-915, 1071, 1073.) He rode in his uncle's car once a week. (4 AA 915.) He did not launder his uncle's clothes. (4 AA 1069.)

Beginning in 1973, George worked at Abex's Winchester, Virginia plant. (4 AA 1058.) Kesner, however, never visited the Winchester plant, located over 40 miles from Romney across the state line. (4 AA 911, 913.) Kesner never worked with or around any Abex brake linings or other product made at that plant.

The Winchester plant made automotive brake linings, some of which incorporated chrysotile asbestos. (4 AA 932, 1058.) Beginning in the early to mid-1970s, shortly after the advent of the Occupational Safety and Health Administration (OSHA) and following the increasing concerns about potential health hazards of asbestos, Abex placed caution labels concerning asbestos on the packaging of its brake lining products. (4 AA 932-933, 937, 955-956.) At some point in the 1970s, Abex provided George and all other Winchester employees a written booklet describing in detail potential health hazards of asbestos. (4 AA 1075.)

Abex regularly swept and dusted the plant using manual and automated equipment. (4 AA 1079-1080.) George was aware that air samples were taken regularly, OSHA inspected the plant, and

Abex was never cited for any excessive dust violations. (4 AA 1080.) Abex maintained an industrial hygiene department and conducted its own regular air samplings of the Winchester plant to detect airborne dust. (4 AA 1094-1095.) Dust was generated by a variety of manufacturing processes, but the dust levels were generally below those mandated by federal regulations, and Abex took numerous dust suppression steps starting well before George's employment began. (4 AA 1099.) Overall, George liked Abex and spent four decades working at the Winchester plant. (4 AA 1081.)

The plant had showers for George to use, and he understood he could change clothes after his shift. (4 AA 1065, 1078.) Though he rarely changed before going home, he always dusted himself off as best he could and, upon arriving home, he always removed his shoes before entering the home. (4 AA 1065-1066.) His clothes would be somewhat dusty. (Typed opn. 3; see also 4 AA 1066 [his clothes were "a little bit" dusty].) George's wife, Francis, laundered George's work clothes. (4 AA 1069.)

In early 2011, Kesner was diagnosed with peritoneal mesothelioma, a cancer of the lining of the abdomen. (Typed opn. 2.)

PROCEDURAL HISTORY

A. The pleadings

Kesner filed suit in 2011 against 19 defendants, including Abex. (Typed opn. 2; 5 AA 1218-1219, 1230.) The list of defendants

included manufacturers of pumps, turbines, oil purifiers, generators, and other industrial and shipboard machinery or supplies, as well as a ship builder, suppliers of raw asbestos fiber, repair and decking contractors, and insulation suppliers and contractors. (5 AA 1218-1219.)

The complaint asserted that Kesner handled or used these defendants' asbestos-containing products, that the products were defective, and that the defendants had not warned Kesner. (5 AA 1220-1225.)

By the time of trial, Kesner had resolved his claims against his employers and the manufacturers of asbestos-containing products that he used, leaving Abex as the sole remaining defendant. (Typed opn. 3.) Kesner had originally alleged three causes of action: negligence, breach of warranties, and strict liability. (Typed opn. 2-3; 5 AA 1215, 1220, 1226, 1227.) The latter two causes of action were summarily adjudicated in favor of Abex because Kesner did not claim, and had no evidence of, exposure to any product that Abex placed in the stream of commerce. Kesner has not challenged the grant of summary adjudication, nor does he dispute that his only cause of action against Abex is a negligence claim based on alleged take-home exposure from his uncle's work at Abex.

B. The court proceedings

Shortly before the designated trial date, the Court of Appeal decided *Campbell v. Ford Motor Co.* (2012) 206 Cal.App.4th 15

(*Campbell*), holding that a duty of care did not extend from premises owners to family members of workers. Abex moved for nonsuit, arguing that *Campbell* precluded imposing a duty of care on Abex for take-home exposures. (6/27/12 RT 4-8.) The trial court granted Abex's motion, ruling that "Abex owed no duty to Kesner for any exposure to asbestos through contact with an employee of the Abex plant in Winchester, Virginia." (5 AA 1269-1270.) The trial court entered judgment for Abex following the nonsuit. (Typed opn. 3; 5 AA 1273.)

Kesner timely filed a notice of appeal and a petition for writ of mandamus. (5 AA 1274-1280.) The Court of Appeal, First District, Division Three, consolidated the appeal with the writ proceedings. (Typed opn. 4.) On May 15, 2014, the Court of Appeal issued its opinion, reversing the judgment.

LEGAL DISCUSSION

I. THIS COURT SHOULD NOT IMPOSE ON EMPLOYERS A DUTY TO PROTECT AGAINST TAKE-HOME EXPOSURES EXPERIENCED BY PEOPLE WHO ARE NEITHER EMPLOYEES NOR VISITORS TO THE EMPLOYER'S PREMISES.

A. Whether to impose a duty is a question of public policy that requires analysis of multiple factors.

Both the trial court and the Court of Appeal approached the question here as one of duty—whether Abex owed a duty to protect Kesner from harm. If Abex owes no such duty, it cannot be liable for negligence. (See *Campbell, supra,* 206 Cal.App.4th at p. 26 [" 'A fundamental element of any cause of action for negligence is the existence of a legal duty of care running from the defendant to the plaintiff' "].)

Duty is not "an immutable fact of nature," but rather "an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." (*Campbell, supra,* 206 Cal.App.4th at p. 26, quoting *O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 364 (*O'Neil*), emphasis and internal quotation marks omitted; accord, *Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925, 933 (*Hoff*) [impositions of legal duties are " 'merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done' "].)

"The element of a legal duty of care generally acts to limit ' " 'the otherwise potentially infinite liability' " ' that would otherwise flow from every negligent act." (*Campbell*, *supra*, 206 Cal.App.4th at p. 31, quoting *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 397 (*Bily*).) Accordingly, notwithstanding the general rule that "[e]veryone is responsible . . . for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person" (Civ. Code, § 1714, subd. (a)), this Court has held that principles of public policy sometimes dictate a bright-line no-duty rule. (See *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 771 (*Cabral*).)

This Court has identified a variety of considerations courts should consider when determining whether a duty exists in a particular case; these considerations are commonly referred to as the *Rowland* factors. (See *Rowland v. Christian* (1968) 69 Cal.2d 108, 112-113 (*Rowland*).) Those factors include "[1] the foreseeability of harm to the plaintiff, [2] the degree of certainty that the plaintiff suffered injury, [3] the closeness of the connection between the defendant's conduct and the injury suffered, [4] the moral blame attached to the defendant's conduct, [5] the policy of preventing future harm, [6] the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and [7] the availability, cost, and prevalence of insurance for the risk involved." (*Id.* at p. 113; accord, *Cabral*, *supra*, 51 Cal.4th at p. 771.)

Taking those factors into account, along with other considerations of public policy that arise on a case-by-case basis,

this Court has adopted bright-line no-liability rules in various circumstances, especially when the connection between the plaintiff's injury and the defendant's conduct was only indirect. (See, e.g., *Verdugo v. Target Corp.* (2014) 59 Cal.4th 312, 343-344 (*Verdugo*) [retailers have no duty of care to provide defibrillators for patrons' use in a medical emergency]; *O'Neil, supra,* 53 Cal.4th at pp. 362-363 [manufacturers have no duty of care to prevent injuries from another manufacturer's product, even when those injuries are foreseeable]; *Hoff, supra,* 19 Cal.4th at pp. 933, 937 [school districts owe no duty to non-students with whom schools have no preexisting relationship]; see also *Thing v. La Chusa* (1989) 48 Cal.3d 644, 661-664 (*Thing*) [disallowing recovery for "bystander" emotional distress except for immediate family members who witness the injury]; *Elden v. Sheldon* (1988) 46 Cal.3d 267, 269-276 (*Elden*) [disallowing recovery for an unmarried cohabitant's loss of consortium or emotional distress]; *Borer v. American Airlines, Inc.* (1977) 19 Cal.3d 441, 444, 447 (*Borer*) [disallowing recovery for a child's loss of a parent's consortium]; *Baxter v. Superior Court* (1977) 19 Cal.3d 461, 464 (*Baxter*) [disallowing recovery for parent's loss of a child's consortium].)

No one doubts that plaintiffs affected by these bright-line rules have actual, legitimate injuries. For example, the plaintiffs in *Verdugo* and *O'Neil* were suing for the death of a loved one. In *Hoff,* the plaintiff suffered serious physical injuries in a car accident. *Thing* disallowed an emotional distress claim by a mother whose son was struck by a car and seriously injured, despite the undeniable emotional distress inherent in that situation. *Borer* and

Baxter barred claims for loss of the comfort and society of a parent or child, despite the very real suffering in such cases. Nonetheless, on public policy grounds, this Court drew bright-line rules barring recovery for those injuries, based on the one-step-removed status of the claimant vis-à-vis the defendant's conduct.

This Court has consistently recognized that such line-drawing is absolutely necessary, even if it may produce a harsh result in a particular case. As the Court observed in *Thing*, bright-line rules are "indisputably arbitrary," but "drawing arbitrary lines is unavoidable if we are to limit liability and establish meaningful rules for application by litigants and lower courts." (*Thing*, *supra*, 48 Cal.3d at p. 666.)

B. Nationwide, a growing majority of courts have concluded that imposing a duty to protect against take-home exposures is bad public policy.

Many courts around the country have already addressed the question whether employers, premises owners, or manufacturers have a duty to protect against take-home exposures to asbestos or other substances. Most courts have concluded, regardless of the type of defendant involved, that defendants do not owe such a duty to those with whom they have no employment, invitee, or customer relationship . Six other state high courts have already held that no duty exists in these types of cases:

Delaware: *Price v. E.I. Dupont de Nemours & Co.* (Del. 2011) 26 A.3d 162, 170 (*Price*) [defendant employer owed no duty to

protect employee's wife against take-home exposures to asbestos fibers];

Georgia: *CSX Transp. Inc. v. Williams* (2005) 278 Ga. 888, 891 [608 S.E.2d 208, 210] [defendant employer owed no duty to "a third-party, non-employee, who comes into contact with its employee's asbestos-tainted work clothing at locations away from the workplace"];

Iowa: *Van Fossen v. MidAmerican Energy Co.* (Iowa 2009) 777 N.W.2d 689, 696-699 (*Van Fossen*) [premises owner owed no duty to protect spouse of independent contractor's employee from take-home asbestos exposure];

Maryland: *Georgia Pacific, LLC v. Farrar* (2013) 432 Md. 523, 526-527 [69 A.3d 1028, 1031] (*Farrar*) [manufacturer owed no duty to protect against take-home exposure to plaintiff who claimed she was exposed to asbestos fibers that her grandfather brought home from the workplace]; see also *Doe v. Pharmacia & Upjohn Co., Inc.* (2005) 388 Md. 407, 419-423 [879 A.2d 1088, 1095-1097] (*Doe*) [employer owed no duty to spouse of employee, where employee was infected with HIV during laboratory work and transmitted virus to spouse];

Michigan: *In re Certified Question from the Fourteenth Dist. Court of Appeals of Texas* (2007) 479 Mich. 498, 515-526 [740 N.W.2d 206, 216-222] (*Certified Question*) [premises owner owed no duty to protect against take-home asbestos exposure to stepdaughter of independent contractor's employee];

New York: *Matter of New York City Asbestos Litig.* (2005) 5 N.Y.3d 486, 493-498 [840 N.E.2d 115, 119-122] (*New York City

Asbestos Litigation) [employer owed no duty to protect employee's wife from take-home asbestos exposure].[1]

In addition, a majority of other courts, including federal courts applying state law, have reached the same conclusion:

- *Gillen v. Boeing Co.* (E.D.Pa., Aug. 26, 2014, No. 13-cv-03118-ER) ___ F.Supp.2d ___ [2014 WL 4211354, at p. *5] [applying Pennsylvania law; employer/ premises owner owes no duty to spouse of employee to protect against take-home asbestos exposures];

- *Bootenhoff v. Hormel Foods Corp.* (W.D.Okla., July 30, 2014, No. CIV-11-1368-D) 2014 WL 3744011, at pp. *7-14] (*Bootenhoff*) [slip opn.] [applying Oklahoma law; employers owed no duty to protect employee's wife from take-home asbestos exposure]

- *Martin v. Cincinnati Gas and Elec. Co.* (6th Cir. 2009) 561 F.3d 439, 444-446 (*Martin*) [applying Kentucky law; neither employer nor manufacturers owed a duty to protect employee's spouse from take-home exposures];

- *Alcoa, Inc. v. Behringer* (Tex.App. 2007) 235 S.W.3d 456, 460-462 (*Alcoa*) [employer owed no duty to protect against take-home asbestos exposure to employee's spouse];

- *Rohrbaugh v. Owens-Corning Fiberglas Corp.* (10th Cir. 1992) 965 F.2d 844, 846-847 (*Rohrbaugh*) [applying Oklahoma law; product manufacturer owed no duty to warn spouse of product user with respect to take-home asbestos exposures].

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[1] The Illinois Supreme Court also granted review in a case raising a take-home duty question, but did not resolve the issue because it concluded that the record did not contain sufficient information to resolve the issue. (*Simpkins v. CSX Transp., Inc.* (2012) 358 Ill.Dec. 613, 620-621 [965 N.E.2d 1092, 1099-1100].)

One of the primary public policy considerations leading courts to adopt a no-duty rule for take-home cases is the tenuous connection between the plaintiff and the defendant. Thus, courts have been reluctant to find a premises owner liable to someone who never set foot on the premises, or impose liability on an employer for an injury to a non-employee. For example, New York's high court observed, when declining to impose a duty on employers to protect against take-home exposures, that the relationship—or lack of relationship—between the parties is the " 'key' consideration." (*New York City Asbestos Litigation, supra,* 840 N.E.2d at p. 119.) Similarly, the Michigan Supreme Court has stated that "[t]he *most important factor to be considered is the relationship of the parties.*" (*Certified Question, supra,* 740 N.W.2d at p. 211, emphasis added.) The Delaware Supreme Court found that an employer could not be liable in negligence to the spouse of its employee because no "special relationship" existed between the employer and the spouse. (*Price, supra,* 26 A.3d at pp. 169-170.)[2]

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[2] Following the same line of reasoning, the Iowa Supreme Court declined to impose a duty upon premises owners towards "persons like [plaintiff] who never visited the property owned by [defendant]." (*Van Fossen, supra,* 777 N.W.2d at p. 699.) And the Maryland Supreme Court declined to impose a duty on manufacturers to protect against exposures to "household members who had no connection with the product, the manufacturer or supplier of the product, the worker's employer, or the owner of the premises where the asbestos product was being used." (*Farrar, supra,* 69 A.3d at p. 1039; see also *Doe, supra,* 879 A.2d at p. 1095 [declining to impose a duty on employer to protect spouse who "had no relationship with [defendant]"].)

Another public policy concern supporting the no-duty rule is the fear of burdening defendants with virtually boundless liability. Courts have observed that, if they were to impose a duty to protect against take-home exposures, they would be exposing employers, premises owners, and manufacturers to claims by an enormous pool of potential plaintiffs. As the Iowa Supreme Court observed, imposing a duty in this area would permit claims by "a large universe of other potential plaintiffs" including those who might claim they suffered exposure "in a taxicab, a grocery store, a dry-cleaning establishment, a convenience store, or a laundromat." (*Van Fossen, supra,* 777 N.W.2d at p. 699.) The court concluded that "such a dramatic expansion of liability would be incompatible with public policy." (*Ibid.*)

The Michigan Supreme Court similarly stated that imposing a duty to prevent-take home exposures "would create a potentially limitless pool of plaintiffs." (*Certified Question, supra,* 740 N.W.2d at p. 220; see also *Doe, supra,* 879 A.2d at p. 1096 ["[W]e have noted that the imposition of a duty to an indeterminate class would make tort law unmanageable. [Citation.] [¶] The imposition of a duty of care in this case would create an indeterminate class of potential plaintiffs."].)

Courts have found these concerns particularly significant in in the context of asbestos litigation, which has already resulted in an "avalanche" of lawsuits (*In re Combustion Engineering, Inc.* (3d Cir. 2005) 391 F.3d 190, 200) and a relaxation of traditional tort standards on account of the difficulties inherent in proving product identification and establishing medical causation (see, e.g., CACI

No. 435 [jury instruction setting forth relaxed causation standard exclusively for asbestos cases]).

Courts have recognized that permitting plaintiffs to bring claims against additional defendants for take-home asbestos exposures would only exacerbate the problems courts face in managing the extraordinary volume of asbestos cases, and would threaten to destroy many companies that would be facing a multiplicity of new claims based on events that occurred many years before diagnosis. Memories fade, corporations reorganize, employment and purchase or sales records are gone, even as medical science and regulatory standards continually evolve. Against this backdrop of inherently tricky fact-finding, one commentator observed, "the courts are [ ] wary of the consequences of extending employers' liability too far, especially when asbestos litigation has already rendered almost one hundred corporations bankrupt." (Note, *A Continuing War with Asbestos: The Stalemate Among State Courts on Liability for Take-Home Asbestos Exposure* (2014) 71 Wash. & Lee L.Rev. 707, 710, fns. omitted.)

Some courts have also focused on a third consideration—the foreseeability of harm to the plaintiff—and found that no duty existed because there was no evidence that the defendant could have foreseen a harm from take-home exposures at the time when those exposures occurred. (E.g., *Certified Question*, *supra*, 740 N.W.2d at pp. 217-218; *Alcoa*, *supra*, 235 S.W.3d at pp. 461-462; *Bootenhoff*, *supra*, 2014 WL 3744011, at pp. *8-*9; *Martin*, *supra*, 561 F.3d at pp. 445-446; *Rohrbaugh*, *supra*, 965 F.2d at pp. 846-847; see also *Hoyt v. Lockheed Martin Corp.* (9th Cir. 2013) 540 F. App.

590, 592-593 [nonpub. opn.] [applying Washington law; declining to address duty question, but holding that employer could not be liable to employee's spouse for take-home asbestos exposure because harm from take-home exposure was not foreseeable at the relevant time].)

While the majority of courts have adopted a no-duty rule, some courts have disagreed, finding that a duty exists in take-home cases. Ironically, many of these cases emphasize the same issue that other courts cite when *rejecting* a duty—the extent to which harm to the plaintiff was foreseeable. For example, two state supreme courts have recognized a duty in take-home cases, and both of them focused heavily on the perceived foreseeability of harm:

New Jersey: *Olivo v. Owens-Illinois, Inc.* (2006) 186 N.J. 394, 401-405 [895 A.2d 1143, 1147-1149] (*Olivo*) [holding that premises owner owed a duty to wife of contractor's employee; describing foreseeability of harm as " ' "a crucial element in determining whether imposition of a duty on an alleged tortfeasor is appropriate" ' " such that the question of duty "devolves to a question of foreseeability of the risk"];

Tennessee: *Satterfield v. Breeding Insulation Co.* (Tenn. 2008) 266 S.W.3d 347, 366-367 [holding that employer owed duty to employee's daughter, and explaining that "the foreseeability factor has taken on paramount importance in Tennessee"].

A few state intermediate appellate courts have ruled that employers and other defendants owe a duty to prevent take-home exposures, also emphasizing the issue of foreseeability:

- *Rochon v. Saberhagen Holdings, Inc.* (2007) 140 Wash.App. 1008 [2007 WL 2325214, at pp. *2 -*5]

(*Rochon*) [nonpub. opn.] [holding that defendant owed no duty as an employer or a property owner to protect employee's spouse from take-home exposure to asbestos, but remanding the case for further proceedings to determine whether defendant owed a duty on the grounds that the plaintiff's injury was a foreseeable consequence of the defendant's allegedly unreasonably risky actions]

- *Chaisson v. Avondale Industries, Inc.* (La.Ct.App. 2006) 947 So.2d 171, 183 (*Chaisson*) [holding that employer owed a duty to protect employee's wife from take-home asbestos exposure; noting that Louisiana "relie[s] heavily upon foreseeability when finding a duty"]; *Zimko v. American Cyanamid* (La.Ct.App. 2005) 905 So.2d 465, 482-483 (*Zimko*) [same holding; relying on intermediate appellate decision that was later reversed by New York's high court in *New York City Asbestos Litigation*].

Thus, although the majority of courts have declined to recognize a duty in take-home cases based on broad public policy concerns, courts that focus primarily on the issue of foreseeability have issued conflicting decisions, with some courts holding that a duty exists and some holding that it does not. These inconsistent results have led commentators to criticize the use of foreseeability as the primary consideration in take-home duty analysis. Critics have observed that overemphasis on foreseeability results in an ad hoc determination of duty based on the record evidence in a particular case, rather than a predictable bright-line rule. (See Kotlarsky, *The "Peripheral Plaintiff": Duty Determinations in Take-Home Asbestos Cases* (2012) 81 Fordham L.Rev. 451, 484 ["Decisions based on foreseeability do not provide clear precedents for future cases. . . . Other courts later facing the same issue can reach a

different interpretation of foreseeability simply by distinguishing the facts from the previous case."].)[3]

C. Prior to this case, California Court of Appeal decisions followed the majority rule and declined to impose a duty in take-home cases.

We now turn to the question whether this Court should follow the majority rule in California. Before the Court of Appeal's decision in this case, three published California Court of Appeal decisions had addressed the question of liability for take-home exposures to asbestos and other substances. All three followed the nationwide majority and rejected attempts to impose liability for take-home exposures.[4]

The first case involved take-home exposure to workplace chemicals. In *Oddone v. Superior Court* (2009) 179 Cal.App.4th 813 (*Oddone*), the plaintiff claimed employer-defendant Technicolor was liable for take-home exposures from toxic vapors and chemicals her

[3] See also Kelley, *Restating Duty, Breach, and Proximate Cause in Negligence Law: Descriptive Theory and the Rule of Law* (2001) 54 Vand. L.Rev. 1039, 1046 [stating that foreseeability is "so open-ended [that it] can be used to explain any decision, even decisions directly opposed to each other"]; Cardi, *Purging Foreseeability: The New Vision of Duty and Judicial Power in the Proposed Restatement (Third) of Torts* (2005) 58 Vand. L.Rev. 739, 743 [noting that foreseeability has a "schizophrenic existence" in negligence law].

[4] A fourth published opinion also followed the majority rule on this issue, but that case is now pending before this Court. (See *Haver v. BNSF Railway Co.* (2014) 226 Cal.App.4th 1104, review granted Aug. 20, 2014, S219919.)

husband absorbed on his work clothes. The Court of Appeal noted that no prior reported California decision had extended liability for take-home or secondary exposures. (*Id.* at p. 820.) The court evaluated the *Rowland* factors, beginning with the observation that the plaintiff's arguments fell "strikingly short" with respect to the closeness of the connection between the defendant's conduct and the plaintiff's injury. (*Ibid.*) The court also observed that imposing a duty towards non-employee persons would saddle the defendant employer with an uncertain but potentially very large burden, with untoward consequences to the community in paying for the costs of insuring against such "potentially massive" liability. (*Id.* at p 822.) Accordingly, the court concluded that Technicolor owed no duty to the plaintiff.

In *Campbell,* the court followed *Oddone* in refusing to impose a duty based on claimed take-home exposure to asbestos. (*Campbell*, *supra*, 206 Cal.App.4th at pp. 32-33.) In *Campbell,* plaintiff Eileen Honer developed plural mesothelioma in part, she claimed, from childhood take-home exposures. Her father and brother worked as insulators for an independent contractor that helped build a Ford manufacturing plant in New Jersey, and "were exposed to asbestos-containing products which caused their clothing, bodies, vehicles and tools to be contaminated with great quantities of respirable asbestos fibers." (*Id.* at p. 20.) Plaintiff was in turn exposed to the fibers through contact with her father and brother "as well as their clothing and other belongings." (*Ibid.*)

The *Campbell* court quoted with approval the rationale expressed by the court in *Oddone*, which rationale applies equally to

premises and employer defendants: " 'The gist of the matter is that imposing a duty toward nonemployee persons saddles the defendant employer with a burden of uncertain but potentially very large scope. One of the consequences to the community of such an extension is the cost of insuring against liability of unknown but potentially massive dimension. Ultimately, such costs are borne by the consumer. In short, the burden on the defendant is substantial and the costs to the community may be considerable.' " (*Campbell, supra,* 206 Cal.App.4th at p. 33, quoting *Oddone, supra*, 179 Cal.App.4th at p. 822.) *Campbell* therefore concluded that, under California law, a property owner owes no duty to third parties for take-home exposures. (*Campbell*, at p. 34.)

In the third case, *Elsheref v. Applied Materials, Inc.* (2014) 223 Cal.App.4th 451, 451 (*Elsheref*), a minor and his mother sued his father's former employer for negligence after the minor was born with birth defects. They alleged that the defects were caused by the father's exposure to toxic chemicals at work. (*Ibid.*) Because the defendant allegedly had knowledge of the potentially harmful consequences of secondary exposures due to its conduct, several of the *Rowland* factors (including the moral blame factor and the protection against future harm factor) weighed in favor of imposing a duty. (*Id.* at pp. 459-460.) The "remaining factors[,]" however, "weigh[ed] more strongly against a finding of duty." (*Id.* at p. 460.) The Court of Appeal found it compelling that there "was not a 'close' connection between [the defendant's] conduct and [the plaintiff's] injuries." (*Id.* at p. 460.) Rather, all of the defendant's "allegedly culpable conduct . . . relate[d] to its treatment of [the plaintiff's]

father . . . ." (*Ibid.*, emphasis added.) After considering all of the *Rowland* factors, and relying in part on *Oddone,* the court concluded *"a common law duty of care should not be imposed on* [*the defendant*]." (*Id.* at p. 461, emphasis added.)[5]

D. In other contexts, this Court has embraced the same public policy concerns that other courts have relied on in rejecting a duty in take-home cases.

These Court of Appeal decisions are rooted in sound public policies previously cited by this Court in other factual contexts. As noted, the relationship (or lack thereof) between the parties is one of the considerations that courts have taken into account in deciding not to impose a duty. That is one of the factors this Court identified in *Rowland.* (*Rowland, supra,* 69 Cal.2d at pp. 117-118.) And that

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[5] Oddly, the Court of Appeal allowed plaintiffs' strict liability claim to proceed, reasoning that "Duty Is Not An Element of Plaintiffs' Strict Products Liability Claim." (*Elsheref, supra,* 223 Cal.App.4th at p. 463, emphasis omitted.) Of course, this Court, along with numerous others, have recognized that duty *is* an element of a strict liability claim. (E.g., *O'Neil, supra,* Cal.4th at pp. 348, 362 ["in strict liability as in negligence," duty must be evaluated based on public policy factors beyond foreseeability; holding "defendants had no duty to warn of risks arising from *other manufacturers'* products"].) And *Elsheref* was not, in any event, a case arising out of a manufacturer's sale or distribution of a product, because the alleged exposures occurred during the manufacturing process, and not during use of a product sold in the stream of commerce. *Elsheref's* duty analysis as to strict liability is not in play here, because as noted, no claims of product liability remain against Abex in this case.

factor played a significant rule in this Court's decision not to impose a duty in *Hoff*.

The plaintiff in *Hoff* argued that because the defendant school district owed a duty to supervise its students, it would not be much of a leap to extend that duty to persons foreseeably endangered by a student's conduct off campus. (*Hoff*, *supra*, 19 Cal.4th at pp. 933-934.) This Court disagreed and concluded that due to the more remote relationship between the district and the non-student plaintiff, the district owed him no duty. (*Id.* at pp. 933-937.) In so doing, the Court explained that a general foreseeability of off-campus accidents is not sufficient to impose a duty, in the absence of evidence that a *particular* accident was *unusually* foreseeable. (*Id.* at p. 936; see also *Verdugo*, *supra*, 59 Cal.4th at p. 340 [retailers owe no duty to provide defibrillators for patrons in the absence of *heightened* foreseeability].)

The remoteness of the connection between the plaintiff and the defendant also led this Court to adopt a no-duty rule in *Bily*. There, this Court held that auditors owe no duty of care to third parties who are not their clients. In so doing, the Court noted that imposing a duty would be bad public policy because it would create liability disproportionate to the remote connection between the auditor's conduct and the third party's injury. (*Bily*, *supra*, 3 Cal.4th at p. 402.) As in *Hoff*, the Court noted that the injury to the plaintiff was foreseeable in the general sense that auditors can foresee that third parties will read and rely on their audit reports (*id.* at p. 398), but that general level of foreseeability was not

sufficient to outweigh the public policy concerns weighing against a duty.

The other main rationale courts have cited when rejecting a duty in take-home cases is the burdensome effect of permitting liability to a virtually limitless pool of plaintiffs. This Court in *Bily* noted the "conceivably limitless" liability that might occur if it imposed a duty of care on auditors with respect to nonclients. (*Bily, supra,* 3 Cal.4th at p. 376; see also *id.* at p. 400 [recognizing a duty "raises the spectre of vast numbers of suits and limitless financial exposure"].) Similarly, in *Elden* this Court noted "the need to limit the number of persons to whom a negligent defendant owes a duty of care," and emphasized that extending the duty too far would create "an entirely unreasonable burden on all human activity." (*Elden, supra,* 46 Cal.3d at p. 276.)

More recently, this Court decided to impose a duty on architects towards residential homeowners precisely because such a duty would *not* create liability to an open-ended group of plaintiffs: "recognizing that an architect . . . owes a duty of care to future homeowners does not raise the prospect of ' "liability in an indeterminate amount for an indeterminate time to an indeterminate class." ' " (*Beacon Residential Community Assn. v. Skidmore, Owings & Merrill LLP* (2014) 59 Cal.4th 568, 583.)

As noted, courts in other jurisdictions have found the specter of limitless liability particularly important in asbestos cases, given the enormity of asbestos litigation. Nowhere does that concern carry more weight than in California. The Administrative Office of the Courts (AOC) has addressed the growth of the asbestos docket

in this state, noting that "[a]sbestos litigation has been called . . . an elephantine mass" and that asbestos litigation "strain[s] the judicial and staffing resources of the state courts."[6]

The AOC report observed that asbestos filings appear to be on the rise in California: "The Superior Court of Los Angeles County has experienced an increase in asbestos filings since 2007, just as a number of plaintiff firms from Texas and southern Illinois have opened offices there in response to reforms enacted in their home states. Such shifts are consistent with the filing patterns observed over time by RAND and may portend a sharp increase in California asbestos litigation in the near future." (*Improving Asbestos Case Management*, p. 3, fn. omitted; see *ibid.* [" 'plaintiffs' firms are steering cases to California, partly to the San Francisco-Oakland area, . . . but also to Los Angeles. . . . California is positioned to become a front in the ongoing asbestos litigation war.' "].)[7]

The Court of Appeal dismissed the notion that imposing a duty in this case would create limitless liability for defendants. The

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[6] Judicial Council of Cal., Admin. Off. of Cts., *Improving Asbestos Case Management in the Superior Court of San Francisco* (Nov. 2010) DataPoints, p. 1 <http://goo.gl/e5v5Fr> (hereafter *Improving Asbestos Case Management*)[as of Oct. 14, 2014].

[7] See also Civil Justice Association of California, *Asbestos Research Project* (2014) p. 4 <http://goo.gl/LZZZF8> [as of Oct. 16, 2014] ["asbestos filings are on a significant upward trend in Los Angeles"]; Wasserman et al., *Asbestos Litigation in California: Can it Change for the Better?* (2007) 34 Pepp. L.Rev. 883, 884-885, fns. omitted ["[A]sbestos cases still remain an enormous burden on the California legal system. . . . With plaintiff firms from Texas and elsewhere opening offices in California, there is no doubt that even more asbestos cases are on their way to the state."].

Court of Appeal reasoned that imposing a duty would have little impact because not everyone can claim to have mesothelioma or other diseases associated with workplace toxins. (Typed opn. 10.) The sheer number of cases nationwide addressing this issue suggests that take-home claims are far more common than the Court of Appeal suggests. Indeed, Kesner's own briefing in this Court contradicts the Court of Appeal's efforts to downplay the prevalence of such claims. Kesner's answer to the petition for review acknowledged that some 250 mesothelioma cases—which comprise just one subset of the toxic exposure claims affected by the duty questions raised in the petition for review—are diagnosed annually in California alone, resulting in numerous lawsuits. (APFR 12.) Moreover, there are hundreds more diagnosed annually across the country, resulting in lawsuits filed in California—such as Kesner's. Add to this the fact that each diagnosis generally results in claims against *dozens* of defendants claimed to have collectively contributed to the same injury, the broad impact of imposing a take-home duty cannot be gainsaid.

If a take-home duty is recognized in California, the reach of that duty will be debated in cases involving other diseases. The next logical battleground will be lung cancer litigation, where exposure to asbestos—especially in cigarette smokers—is typically alleged as a cause of the disease. Take-home liability would also impact tort cases involving other ailments attributed to chemicals, dusts, and other carcinogens. (See generally *Oddone, supra,* 179 Cal.App.4th at p. 813 [chemicals]; *Elsheref, supra,* 223 Cal.App.4th at p. 451 [chemicals].)

In sum, nothing about the history of asbestos litigation in America suggests that the lawyers who represent asbestos plaintiffs will fail to take advantage of any opportunity to bring more claims. As New York's highest court dryly observed, in response to the plaintiffs' assertion that recognition of a duty would create few new claims because the incidence of secondhand exposure is so low, "experience counsels that the number of new plaintiffs' claims would not necessarily reflect that reality." (*New York City Asbestos Litigation*, *supra*, 840 N.E.2d at p. 1220.)

E. The Court of Appeal's discussion of countervailing public policies was flawed.

The Court of Appeal in this case rejected the majority rule and concluded that California law imposes upon employers a duty to protect against take-home exposures. The court reached that conclusion based on a short-sighted and flawed analysis of the *Rowland* factors.

First, the court first stated that the "predictability of harm" factor supports a duty because, in the court's view, "harm to others resulting from secondary exposure to asbestos dust is not unpredictable." (Typed opn. 8.) But whether the court believes such harm is predictable *today* (a point still hotly debated among epidemiologists and pathologists) is not the issue. The court should have considered whether any consensus existed that harm to someone like Kesner was predictable in the 1970s or 1980s, given his remote connection to Abex. This court in *Cabral* said,

"Generally speaking, where the injury suffered is connected only distantly and indirectly to the defendant's negligent act, the risk of that type of injury from the category of negligent conduct at issue is likely to be deemed *unforeseeable*." (*Cabral, supra,* 51 Cal.4th at p. 779, emphasis added.)

Moreover, this Court has explained that courts should consider the foreseeability of harm, like all the *Rowland* factors, at a "relatively broad level of factual generality." (*Cabral, supra,* 51 Cal.4th at p. 772.) That is consistent with this Court's previous decisions explaining that an awareness of a remote *possibility* of harm is insufficient to support the imposition of a duty—even if that possibility of harm materialized in a particular case. This Court has repeatedly held that a defendant's ability to foresee a remote possibility of harm did not warrant imposing a duty, unless there was a relationship between the parties, or a specific or "heightened" level of foreseeability. (See *Verdugo, supra,* 59 Cal.4th at pp. 340-341 [retailers owe no duty to make defribrillators available to patrons, despite the foreseeability that a certain number of patrons will inevitably suffer cardiac arrest; no showing of "heightened" foreseeability]; *Hoff, supra,* 19 Cal.4th at p. 937 ["[g]iven the immaturity of teenage drivers, accidents caused by their reckless driving are statistically foreseeable. Yet the Legislature has concluded that the benefits to society from issuing them licenses outweighs the risks. Therefore, school personnel who lack specific knowledge about the dangerous propensities of a particular student driver have no duty to off-campus nonstudents."]; *Bily, supra,* 3 Cal.4th at p.398 [declining to impose a duty even though, "[i]n a

broad sense, economic injury to lenders, investors, and others who may read and rely on audit reports is certainly 'foreseeable' "].)

Second, the Court of Appeal stated that a duty is warranted based on "the degree of certainty that the plaintiff suffered injury," another *Rowland* factor. (Typed opn. 8.) The Court of Appeal stated its belief that "[t]here often is no doubt that a plaintiff, like Kesner, suffering from malignant mesothelioma, has suffered injury due to exposure to friable asbestos." (*Ibid.*) The court was apparently unaware that a substantial percentage of mesotheliomas are not attributed to asbestos-containing products. (See Brickman, *Fraud and Abuse in Mesothelioma Litigation* (2014) 88 Tul. L.Rev. 1071, 1072, fn. 5 [" 'mesothelioma occurs in all populations even in the absence of asbestos exposure' "].)[8] But even if it were true that all mesotheliomas are caused by exposure to asbestos products, there is no certainty that Kesner's injury was caused by his childhood exposures to asbestos fibers on his uncle's clothing, *as opposed to his own occupational work with asbestos*. This *Rowland*

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[8] See also *Becker v. Baron Bros., Coliseum Auto Parts, Inc.* (1994) 138 N.J. 145, 155-156 [649 A.2d 613, 618] [plaintiff's witness testified that 15 percent of cases "have no known cause," and defendant's witness testified that twenty to forty percent of cases have "unknown causes"]; Behrens, *What's New in Asbestos Litigation?* (2009) 28 Rev. Litig. 501, 527 [asserting that "there is wide agreement that a significant number (by some estimates, twenty to thirty percent) of mesotheliomas are not asbestos-induced"]; Landin et al., *Lessons Learned from the Front Lines: A Trial Court Checklist for Promoting Order and Sound Policy in Asbestos Litigation* (2008) 16 J.L. & Pol'y 589, 641 [reporting estimate of 10 to 20 percent of mesotheliomas caused by "non-asbestos sources"].

factor should be given little weight when the injury in question is a form of latent disease and the plaintiff alleges that the defendant's conduct was one of many contributing factors that incrementally increased the plaintiff's risk over his lifetime. Otherwise, this factor would support imposing a duty on every defendant that may have had an alleged carcinogen on its premises or at its workplace at some point in time.

Third, the Court of Appeal suggested that the third *Rowland* factor—the closeness of the connection between the defendant's conduct and the injury suffered— supports a duty here. (Typed opn. 8 [stating that the first three *Rowland* factors tend to support extending a duty to Kesner].) The Court of Appeal offered no explanation for that statement, which is indefensible. It can hardly be said that a close connection existed between Abex and Kesner, who never set foot on Abex's facility or used an Abex product.

Fourth, the Court of Appeal relied on the "moral blame" factor identified in *Rowland*. (Typed opn. 8.) The court reasoned that the complaint establishes Abex's moral blameworthiness by alleging that Abex was aware (in some undefined way) of risks of asbestos exposure (of undefined fiber types, at undefined levels) and took no steps to avoid those risks. (*Ibid.*) But Abex *did* take steps to protect its workers. (See 5 AA 1215-1230.) Moreover, he never alleged that Abex's failure to protect against take-home exposures was anything more than mere negligence. As *Campbell* observed, " 'the moral blame that attends ordinary negligence is generally not sufficient' . . . courts require a *higher degree of moral culpability*." (*Campbell*, *supra*, 206 Cal.App.4th at p. 32, emphasis added.) Nothing in the

complaint here suggests that Abex had that sort of heightened culpability with regard to take-home exposures.

The Court of Appeal suggested that Abex's conduct was more blameworthy than Ford's conduct in *Campbell* because Ford's conduct was "passive," whereas Abex was involved in the manufacturing of asbestos-containing brake linings. (Typed opn. 7.) That active/passive distinction cannot withstand scrutiny. Both Ford and Abex had the duty to use reasonable care in the use of their premises. Ford, as a premises owner, was responsible for maintaining a safe environment on its property. Abex, as a premises owner and employer, was similarly responsible for maintaining a safe environment in the workplace. Both defendants were alleged to have knowledge that asbestos exposure could, at least in general terms, be harmful. Although *Campbell* involved a premises liability claim and this case involves negligence in the operation of a workplace, both theories require proof of the same elements. (See *Castellon v. U.S. Bancorp* (2013) 220 Cal.App.4th 994, 998.) There is no principled basis for imposing a duty on one and not the other.

Finally, the Court of Appeal concluded that the *Rowland* factor of preventing future harm also supported imposition of a duty here. (Typed opn. 8-9.) The court conceded that imposing a duty would not prevent future harm from *asbestos,* which is already the subject of strict regulation under both federal and California law. (*Ibid.*; see also *Taylor v. Elliott Turbomachinery Co. Inc.* (2009) 171 Cal.App.4th 564, 595 & fn. 14.) The court could have added that asbestos is no longer used commercially in the United States.

Nevertheless, the Court of Appeal stated that imposing a duty would prevent future harm from other substances. (Typed opn. 9.) But of course, the federal and state occupational health and safety regulations apply not only to asbestos, but to all manner of hazardous substances that may be found in the workplace. (See, e.g., 29 C.F.R. § 1910.1200 (2013) [comprehensive federal regulations governing the labeling of hazardous materials in the workplace and the implementation of employee training programs and protective measures]; Lab. Code, §§ 9001-9052 [comprehensive statutes governing the handling of workplace carcinogens].) There simply is no reason to believe that imposing a duty in this case would meaningfully increase the likelihood of preventing harm in the future.

F. The proximate cause doctrine also weighs against liability for take-home exposures.

Prior decisions on take-home liability have consistently approached the issue as a question of duty, but it can also be analyzed as a question of proximate cause, which is a required element of any negligence claim. (*Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 Cal.3d 49, 54, fn. 4.) This Court has explained that proximate cause is a concept that incorporates both the issue of cause-in-fact as well as a broader analysis of public policy considerations:

> "Proximate cause involves *two* elements." [Citation.] "One is *cause in fact*. An act is a cause in fact if it is a necessary antecedent of an event.". . .

> [T]he second element focuses on public policy considerations. Because the purported causes of an event may be traced back to the dawn of humanity, the law has imposed additional "limitations on liability other than simple causality." [Citation.] "These additional limitations are related not only to the degree of connection between the conduct and the injury, but also with public policy." [Citation.] Thus, *"proximate cause 'is ordinarily concerned, not with the fact of causation, but with the various considerations of policy that limit an actor's responsibility for the consequences of his[, her, or its] conduct.'* "

(*Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037, 1045 (*Ferguson*), emphasis added in second paragraph; see also *Mosley v. Arden Farms Co.* (1945) 26 Cal.2d 213, 221 (conc. opn. of Traynor, J.) [" 'What we do mean by the word "proximate" is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point,' " quoting *Palsgraf v. Long Is. R.R. Co.* (1928) 248 N.Y. 339, 352 [162 N.E. 99, 103] (dis. opn. of Andrews, J.)].)

The first aspect of proximate cause—cause in fact—will be a question of fact for the jury when there are factual disputes about whether the defendant's conduct played any medically causal role at all in the plaintiff's injury. But the second aspect of proximate cause—the weighing of various considerations of public policy even where cause-in-fact has been established—is necessarily a question of law for the court. (See *PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 315-319 (*PPG*); *Maupin v. Widling* (1987) 192 Cal.App.3d 568, 574.)

This Court has employed the doctrine of proximate cause to hold that a defendant is not responsible for an injury that is simply too far removed from the defendant's conduct (or was more directly caused by others). (See *Ferguson, supra,* 30 Cal.4th at pp. 1045-1053; *People v. Cervantes* (2001) 26 Cal.4th 860, 866-874; *PPG, supra,* 20 Cal.4th at pp. 315-319; see also *Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 65 [noting that the proximate cause doctrine is the underlying basis for the sophisticated purchaser defense in products liability cases].) Thus, when a defendant's alleged misconduct is followed by a series of events outside the defendant's control, such that the defendant's role in the ultimate harm to the plaintiff is remote and indirect, the proximate cause doctrine weighs against imposing liability on the defendant.

In this case, the relevant policy concerns for proximate cause analysis are the same as those discussed above in connection with the duty issue. There is at most an extremely remote connection between Abex's conduct at its plant and Kesner's alleged occasional exposure at his uncle's house 40 miles away. Abex could not control what Kesner's uncle did once he left the plant, how he handled his dusty clothes, who he came into contact with, how much and when Kesner visitied him, or whether Kesner played with his uncle when his uncle was wearing his dirty work clothes. If the series of events allegedly leading to Kesner's injury constitutes proximate cause, that raises the prospect of imposing unbounded liability to a limitless pool of potential plaintiffs suing dozens of tangentially involved defendants in each lawsuit.

Those public concerns fully justify the trial court's grant of nonsuit to Abex, whether the issue is viewed prospectively (as a question of whether Abex owed a duty to its employee's nephew), or retrospectively (as a question of whether the nephew's injuries were the proximate cause of Abex's conduct).

II. IF THIS COURT HOLDS THAT EMPLOYERS OWE A DUTY TO PROTECT NON-EMPLOYEES FROM TAKE-HOME EXPOSURES, THAT DUTY SHOULD NOT BE EXTENDED BEYOND IMMEDIATE FAMILY MEMBERS.

If this Court decides that employers can in theory be liable for failing to protect non-employees from take-home exposures, the Court must then decide whether California law recognizes any limits on such liability. Do employers owe a duty only to immediate family members who reside with their employees? What about babysitters, neighbors, or extended family members who regularly visit an employee's home? What about those outside the home who may have regular contact with the employee's clothes, tools, or automobile, such as carpool partners, fellow commuters on public transportation, and laundry workers?

As noted in *Campbell,* the line is " 'hard to draw' " and could either be over-inclusive or under-inclusive. (*Campbell, supra,* 206 Cal.App.4th at pp. 32-33.) Indeed, the difficulty in drawing this line is one of the reasons that the majority of courts nationwide have rejected liability for take-home exposures. (See *New York City*

Asbestos Litigation, *supra*, 840 N.E.2d at p. 122 [refusing to adopt a take-home duty, because "line is not so easy to draw" at just family members].)

But in the minority jurisdictions where courts have been willing to impose liability for take-home exposures, they have drawn the line at immediate family members living in the directly exposed person's household, because only they would be expected to have frequent close contact with contaminated workclothes.

In *Zimko*, *supra*, 905 S.2d at page 483, in which plaintiff claimed take-home exposures through his father, the court elected to impose a duty of care on the employer, but in light of the lack of precedent and "the novelty of the duty" it created, the court limited the scope of that duty to "household members" of the defendant's employees.

Likewise, in *Olivo*, *supra*, 895 A.2d at page 1149, the court imposed a duty but limited it to spouses:

> Exxon Mobil owed a duty *to spouses* handling the workers' unprotected work clothing based on the foreseeable risk of exposure from asbestos borne home on contaminated clothing. We agree with the Appellate Division's assessment of the fairness and justness of imposing on Exxon Mobil such a duty *to plaintiff's wife*.

(Emphases added.)

To emphasize the narrowness of its ruling, the court explained that a measure of "particularized foreseeability" was needed:

> The duty we recognize in these circumstances is focused on the *particularized foreseeability* of harm to plaintiff's wife, who ordinarily would perform typical household

chores that would include laundering the work clothes worn by her husband.

(*Olivo, supra,* 895 A.2d at p. 1150, emphasis added.) Even roommates have been held to be outside the sphere of those to whom a duty is owed, despite their co-habitation with the directly exposed person. (*Schwartz v. Accuratus Corp.* (E.D.Pa., Mar. 25, 2014, No. 12-6189) ___ F.Supp.2d ___ [2014 WL 1225896, at p. *5] [in take-home beryllium exposure action under New Jersey law, the court ruled that the *Olivo* rule of take-home liability could not be extended to cover a non-spouse: "While an employer working with beryllium might foresee potential danger to mere roommates and visitors, the considerations policy and fairness noted by the *Olivo* court demand that take-home liability be reasonably limited"].)[9]

The Court of Appeal held that Abex owed a duty to Kesner because his contact with his uncle was, by some subjective measure, extensive, and not merely casual or incidental. (Typed opn. 10-11.) By imposing a duty to protect someone who was at most a regular visitor to the household of an Abex employee, the Court of Appeal provided no meaningful basis for limiting the pool of potential take-home plaintiffs. Virtually every asbestos plaintiff will be able to fashion a theory of non-incidental contact with someone who might have had asbestos fibers on their clothing. Decades after the fact,

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[9] See also *Chaisson, supra,* 947 So.2d at page 200 [finding employer owed duty to employee's wife for take home asbestos exposures, but clarifying that the duty was based on "the facts and circumstances of this case," was not "a categorical duty rule," and was limited to a spouse exposed "from laundering her husband's work clothes"].)

when objective witnesses and corroborating evidence will be largely outside the defendants' reach, how are the defendants to rebut the plaintiffs' claims about their daily habits? If the Court is inclined to impose a duty at all (and it should not, for the reasons addressed above), the duty should extend only to immediate family members who lived full-time with the employee at the relevant time, and who had frequent close contact with contaminated workclothes. Drawing the line there would place at least *some* restriction on the multiplicity of take-home cases that California courts will be facing if a duty is recognized in this case.

CONCLUSION

The Court should reverse the Court of Appeal and uphold the trial court's judgment of nonsuit.

October 17, 2014

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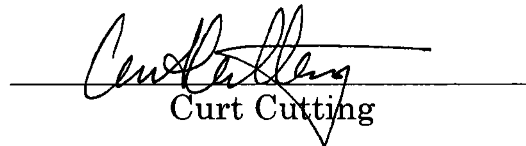
CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.520(c)(1).)

The text of this brief consists of 9,668 words as counted by the Microsoft Word version 2010 word processing program used to generate the brief.

Dated: October 17, 2014



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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On October 17, 2014, I served true copies of the following document(s) described as **OPENING BRIEF ON THE MERITS** on the interested parties in this action as follows:

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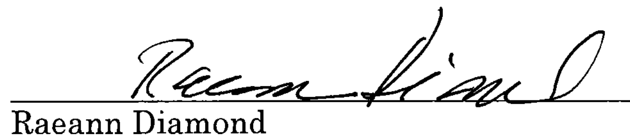
BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 17, 2014, at Encino, California.



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Kesner v. The Superior Court of Alameda County
Cal. Supreme Court Case No. S219534

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